IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 165 OF 2006

IN

NOTICE OF MOTION NO. OF 2006

IN

SUIT NO. 93 OF 2005

Mrs. Shahjahan Gulfam Shamani Residing at Room No. 501, 6th Floor, 2-B Uttam Building, Dr. Ram Manohar Co-operative Housing Society Ltd., Taximen Colony, Kurla (West), Mumbai - 400 070.	Appellant (Original deft. No. 3)

Versus

1) Vinod Kumar Takhatmal Kachhara of Mumbai, Indian Inhabitant residing at 4/A, Venus Regency Navroji Lane, Ghatkopar (West), Mumbai - 400 086	
2) Sohanlal Vardichand Dhakad, of Mumbai, Indian Inhabitant, residing at 2/B, Mahavir Bhavan, Sarveshwar Mandir Marg, Kurla (West),Mumbai - 400 070 and also at Mangal Jewellers, 29-C, Agarwal Market, Vile Parle (East),Mumbai - 400 057	Respondents Original Plaintiff, Defendant nos. 1 & 2 respectively)
3) Mr. Sahajahan Gulfam Shamani Residing at Room No. 501, 6th Floor, 2-B Uttam Building, Dr. Ram Manohar Co-operative Housing Society Ltd., Taximen Colony, Kurla (West), Mumbai - 400 070.	

Mr. Pratap Singh, Advocate for the Appellant.

Mr. T.N. Subramaniam, Senior Advocate i/b Sawant Associates for Respondent No. 1.

Mr. Dipan Merchant,Senior Advocate for Respondent no.2.

CORAM : KSHITIJ R. VYAS, C.J. &
ABHAY S. OKA, J.
DATE : 13TH JULY, 2006

P.C.

1. The Appellant is the third defendant in a suit filed by the first respondent in this Appeal. The Appellant has taken exception to the judgment and order dated 27th January, 2006 passed by the learned Single Judge in Notice of Motion No. 100 of 2005 in Suit No. 93 of 2005. By the impugned judgment and order, the learned Single Judge granted Prayer clause (a) of the Notice of Motion. Prayer clause (a) is for appointment of Receiver of the Shop No. 1 on the ground floor of the building "Shreddha" on Plot of land bearing City Survey No.278 and 279 situate at Belgarmi Road, Kurla, Mumbai and for appointment of the first respondent-plaintiff as the Agent of the Court Receiver without any security or compensation.

2. The learned counsel appearing for the Appellant submitted that the Appellant is in settled possession of the Shop No. 1 as well as the basement below the shop No. 1 and therefore by appointing Receiver, he cannot be dis-possessed. He submitted that the first respondent, the second respondent (original- the first

defendant) and one Mrs. Seemadevi Bherulal Jain are the co-owners of the Plot on which the suit shop premises is situated. He submitted that he has purchased the suit premises by an Agreement for Sale executed by the first defendant on behalf of M/s Shah Enterprises of which the plaintiff was a Partner. He submitted that there is material on record to show that on 16th May, 2004 the Appellant had arranged inauguration function of a Dental Clinic in the suit shop and the basement and the said function was attended by the first respondent- plaintiff himself along with the Architect of the building. He placed reliance on Photographs taken on that day which are annexed to the Affidavit in reply to the affidavit filed before the learned Single Judge. He submitted that admittedly the original first defendant was a Partner of M/s Shah Enterprises. He submitted that whether the firm is dissolved or not and whether first respondent has become owner of the property of the firm or not are the questions which are to be decided by the learned Single Judge at the time of trial. He submitted that as per the directions of this Court issued on last date, the Appellant has obtained possession of the shop premises from Dr. Suhail Ahmed Shafique Ahmed Gunwan and now the Appellant is in exclusive possession of the same. He invited my attention to Affidavit-cum-Undertaking filed on behalf of the Appellant by her Attorney Mr. Gulfam Ahmed who is her husband.

3. Shri. Subramaniam, the learned Sr. counsel appearing for the first respondent pointed out that the Appellant has taken the suit premises from the first defendant who ceased to have any right, title and interest in the premises after dissolution of the Firm. He pointed out that the Title Certificate which is referred to in the Agreement for Sale executed in favour of the Appellant itself records that the first defendant has no right in respect of the property after dissolution of the Firm. He submitted that is the reason why the finding has been recorded by the Single Judge that the Appellant is a trespasser. He pointed out that the Appellant is unauthorisedly using basement below the suit shop premises. He pointed out that the earlier Bench had issued notice to the Municipal Corporation of Greater Bombay. He stated that Shri. D.H. Mehta appearing for the Corporation stated before the Court that unauthorised work of the basement cannot be regularised. He submitted that the Appellant is a trespasser both in respect of shop premises and the basement below it. He therefore submitted that no interference is called for.

4. We have considered the submissions. The constituted Attorney and the husband of Appellant has filed an Affidavit. In the said Affidavit, it is stated that third party which was in possession of the shop has vacated the shop and now the shop and basement

are in possession of the Appellant. Prima facie, the Appellant was in possession of the shop in respect of the Receiver is appointed on the date of institution of suit. The Appellant claims to be in possession on the basis of an Agreement for Sale executed in his favour by one of the partners of erstwhile Firm in which even the plaintiff was a partner. There is some material on record to show that the plaintiff attended inauguration ceremony of a Clinic which was arranged by the Appellant- third defendant in the suit shop. Considering all the findings which are recorded by the Single Judge, it is difficult to find fault with the order of appointing the Court Receiver. However the question is whether the Appellant who is in possession can be thrown out by appointing the plaintiff as an Agent of the Receiver.

5. As stated earlier, the Appellant was in possession of the suit shop on the date of the suit. Though prima facie, it is found that the vendor of the Appellant had no rights after the dissolution of the firm M/s Shah Enterprises, the parties will have to lead evidence on the basis of which final conclusion regarding the rights of the parties will have recorded after trial of the suit. We are of the view that the Appellant cannot ousted from possession of the suit shop especially when the Appellant has taken back possession of the shop from third party. We are of the view that the Appellant deserves to be appointed as the

Agent of the Court Receiver subject to usual conditions regarding payment of royalty and security.

6. Shri. Subramaniam, learned counsel for the first respondent- plaintiff submitted that the basement below shop has been unauthorisedly constructed and occupied. Therefore Appellant should be restrained from using the basement and Receiver should be ordered to seal the basement. In the Notice of Motion taken out by the first respondent on which the impugned order has been passed, the prayer for appointment of Receiver is confined to Shop No.1 on the ground floor. In the Notice of Motion no relief is prayed for as regards the basement. Therefore the first respondent will have to take appropriate proceedings seeking appropriate relief in respect of the basement. In this Judgment we have made no adjudication on the question whether the Appellant is in possession of the basement. However, if the Appellant is in possession, he cannot use the same contrary to law. In any event, the Municipal Corporation is free to take legal action in accordance with law.

7. Hence, we dispose of the appeal by passing following order :

i) The impugned judgment and order is modified. The order appointing Court Receiver, High Court, Bombay in terms of Prayer Clause

(a) of the Notice of Motion is confirmed with the modification that the Appellant will be appointed as Agent of the Court Receiver in respect of Shop No. 1 which is subject matter of Prayer Clause (a). The agency will be subject to usual conditions regarding security and royalty.

ii) It will be open for the first Respondent to take out appropriate proceedings for seeking appropriate relief in respect of basement below the shop of premises. It is made clear that this order shall not be construed to mean that we have permitted the Appellant-third Defendant to occupy the basement. The Municipal Corporation will be free to take action in accordance with law.

(KSHITIJ R. VYAS, CHIEF JUSTICE)

(ABHAY S. OKA, J.)